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IN THE

Supreme Court of the United States

October Term, 1963

No. 376

IVAN DMITRIEVICH EGOROV, and
ALEKSANDRA EGOROVA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Ivan Dmitrievich Egorov and Aleksandra Egorova pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on July 16, 1963.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment denying bail here sought to be reviewed has not been reported and is printed in appendix B hereto, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered July 16, 1963 (Appendix C, D, hereto, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Was the denial of bail to the petitioners pending trial of the case by the District Court for the Eastern District of New York and the affirmance thereof by the Court of Appeals for the Second Circuit in violation of the defendants' constitutional rights pursuant to the Eighth Amendment to the Constitution of the United States?

2. Was the denial of bail to the defendants pending trial a proper exercise of discretion in the denial of bail under Rule 46(a)(1).

Constitutional and Statutory Provisions Involved

The case involves the Eighth Amendment (excessive bail) of the Federal Constitution. It also involves Rule 46(a)(1), F. R. Cr. P. 18 U.S.C.

The Facts

On July 5, 1963, the Hon. Leo F. Rayfiel, District Judge for the Eastern District of New York denied the defendants' application for bail.

On July 16, 1963, the United States Court of Appeals for the Second Circuit also denied bail. *United States* v. *Egoroff*, Nos. 414-415—October Term, 1962 (decision unreported.)

On August 1, 1963, an application for bail was made to Hon. John M. Harlan, Associate Justice of the Supreme Court of the United States. On August 11, 1963, the said application for bail was denied. (Appendix E hereto, *infra*)

On July 2, 1963, the defendants were arrested and charged in a complaint with conspiracy to gather or deliver defense information to aid foreign government (Title 18, United States Code, Section 794, subdivision (c)).

On July 16, 1963, the defendants were indicted in the Eastern District of New York for the crimes of conspiracy to communicate, deliver, and transmit to a foreign government, to wit, Union of Soviet Socialist Republics, information relating to the national defense of the United States in violation of Title 18 U.S.C. 794 (see) (Count 1) and conspiracy to commit offenses against the United States, to wit, to violate Title 18 U.S.C. 951, in violation of Title 18 U.S.C. 371 (Count 2). (Appendix F hereto *infra*).

The defendant Ivan Dmitrievich Egorov was born on July 30, 1921. The defendant Aleksandra Egorova was born on February 23, 1924. Both are citizens of U.S.S.R. having entered the United States under a diplomatic passport on October 10, 1960, under a four-year contract with the United Nations, which expires in October 1964. The defendant Ivan Dmitrievich Egorov has been employed in the Personnel Department of the Secretariat of the United Nations, and more recently as Chief Administrative Officer of that department. On June 20, 1962, Mr. and Mrs. Egorov left the United States and returned to Moscow, Russia, pursuant to a three-month leave of absence theretofore obtained by Mr. Egorov from his duties at the United Nations. The purpose of their return to Russia was for Mrs. Egorova to receive medical treatment. In August of 1962, two major operations were performed on Mrs. Egorova in Russia. Mr. Egorov returned to the United States in September 1962, and Mrs. Egorova, after a recuperative period in Russia, returned to the United

States in November 1962. They are the parents of one child, 12 years of age, who resides in Moscow, Russia. Since 1960, the defendants have resided in the City of New York and since November 1, 1962, they resided in Flushing, Queens, New York, the place of the arrest.

Mr. Egerov is a lawyer having graduated from an accredited university in Russia.

POINT I

Bail is basic to our system of law.

The authority to grant bail is set forth in Rule 46(a)(1), Federal Rules of Criminal Procedure, 18 U.S.C., which provides:

> "Rule 46. Bail
>
> "(a) Right to Bail.
>
> "(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

A guide to the *discretionary* allowance of bail is furnished by the Rule governing the fixation of bail pending appeal or certiorari. Rule 46(a)(2). The exercise of discretion allowed by this Rule is, of course, limited by the principle that bail should normally be granted unless there are overriding considerations of a very drastic nature, such as danger to witnesses, *facts* indicating repetition of the crime charged if released on bail, *facts* indicating like-

lihood that defendant will not be available for process of the court.

Carbo v. *United States*, 82 S. Ct. 662 (1962);
Leigh v. *United States*, 82 S. Ct. 994 (1962).

But the rule of law applicable to the granting of bail *before conviction* is even more favorable to the defendant. Arising from the motivating purpose of the Eighth Amendment and other provisions of the Bill of Rights, the reason for bail is premised upon the presumption of innocence.

> "* * * the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses and preparing a defense."
>
> *Stack* v. *Boyle*, 72 S. Ct. 1, 5 (1951)

> "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."
>
> *Stack* v. *Boyle*, *supra*, 3.

It is, of course, the rule that in cases involving a capital offense, the granting of bail is an exercise of discretion, Rule 46(a)(1) Federal Rules of Criminal Procedure. But, like the discretion given to a court or a judge upon an application for bail pending review after conviction, it must be exercised consistently with the history, philosophy and legal principles which define the meaning and purpose of bail under our system.

> "Bail is basic to our system of law."
>
> *Leigh* v. *United States*, 82 S. Ct. 994, 996 (1962);
> See Eighth Amendment, United States Constitution.

Stack v. *Boyle*, 342 U. S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).

Doubts whether it should be granted or denied should always be resolved in favor of the defendant.

Herzog v. *United States*, 75 S. Ct. 349 (1955).

> "It is to be denied only in cases in which, *from substantial evidence*, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release."
>
> *Leigh* v. *United States*, *supra*, 996 (emphasis supplied)

In this case there is no "substantial evidence" of this character. In fact no evidence of any kind has been presented upon which a denial of bail can be justified.

POINT II

No substantial evidence has been offered justifying the denial of bail.

In denying bail the District Court wrote no opinion. The transcript of the hearing discloses that the Court based its decision upon (a) "the serious nature of the crime" (p. 20*), (b) that "these defendants have no roots here at all" (p. 21) and (c) "the means of leaving this country, and I am speaking of transportation, are so readily available that I think the risk of failure to answer the charges is very great" (p. 25).

The Circuit Court added nothing by way of reasons for the denial of bail. It said merely:

> "We agree with the district court that the nature of the charges, the fact that the defendants are citizens

* p. refers to page numbers of minutes of hearing on application for bail in District Court. (Appendix A hereto, *infra*.)

> of a foreign country and all the circumstances of this case, justify the position of the United States Attorney in urging that bail be denied."

It did not explain what it meant by "all the circumstances of this case."

(*U. S.* v. *Egorov, supra.*)

a. As to "the serious nature of the crime." The nature of the charge cannot by itself be the basis for denying bail; otherwise the presumption of innocence would become meaningless. At most, it is a factor for determining the amount of bail to be fixed.

On this subject perhaps the most extensive commentary in recent times has been made by the Supreme Court of New Jersey which,

> "pursuant to its policy of re-examination and re-evaluating of precedents prior to its Court Reorganization Plan of 1947, made an exhaustive study of bail applications in capital crimes . . ."

Field, Villanova Law Review, 7:438, Spring 1962.

In *State* v. *Konigsberg*, 33 N. J. 367, 164 A. 2d 740 (1960), that Court said:

> "To say that a formal accusation of murder under such circumstances sufficiently establishes even *prima facie*, that the proof of a capital offense is evident or the presumption great to justify the denial of bail is to fly in the face of the constitutional mandate and to fail in the discharge of our judicial duty."

The Court was, of course, referring to the "constitutional mandate" of the New Jersey Constitution, which in Article I; paragraph 11 thereof, states that "All persons shall, be-

fore conviction, be bailable by sufficient surety, except for capital offenses when the proof is evident or presumption great"—a mandate which exists in 38 states. But the reasoning is applicable to state and federal prosecutions alike, since it is premised upon the presumption of innocence which "the nature of the charge" cannot erase. Nor is there any substantial difference between the phrase "when the proof is evident or presumption great" in the 38 state constitutions, and the phrase in Rule 46 of the Federal Rules of Criminal Procedure "giving due weight to the evidence and to the nature and circumstances of the offense." Perhaps that is what led the author of the Article in the Villanova Law Review, above cited, to write:

> "The rule which is applied in the Federal Court is embodied in Rule 46 of the Federal Rules of Criminal Procedure and it has been administered in accordance with the view prevailing in most of the state courts."
>
> *Field, Villanova Law Review, supra,* at p. 439.

Whether it has been so administered or not in all cases, the point is that the exercise of discretion should be based upon standards of due process.

Nor are positive representations by the prosecutor as to the evidence he will produce at the trial sufficient to overcome the presumption of innocence so as to deny bail.

State v. *Konigsberg, supra.*

Another factor present in this case is the contention of the defendants' Government that the defendants are immune from prosecution because of the diplomatic status of the male defendant, and the further contention that any

prosecution against the defendants is within the exclusive jurisdiction of the United States Supreme Court under Article III, Section 2, Clause 2, of the United States Constitution. Neither of these issues has ever been decided by the United States Supreme Court.

b. The availability of transportation. There has been no representation by the Government that it is in possession of any evidence that flight is contemplated. Nor did the District Court or the Circuit Court find that any such evidence existed.* The District Court stated:

> "I certainly shall not be influenced by the fears expressed by Mr. Costa that these defendants, or at least one of them, may avail himself or herself of the security of the Embassy for the purpose of avoiding arrest and punishment."

The only fact adduced was the voluntary statement made by the defendants' counsel that prior to the arrest, Mrs. Egorova had planned to go home to the Soviet Union in July for medical treatment made necessary by previous major surgery. Her desire to return to the Soviet Union for medical treatment was arranged openly.

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*A finding that such information existed seems to have been the basis upon which Mr. Justice Frankfurter, Circuit Justice, affirmed the denial of bail in *Ward* v. *U. S.*, 76 S. Ct. 1063, at 1066. In that case, the District Court concluded, *on the basis of a confidential probation report*, that there was a likelihood of flight. Mr. Justice Frankfurter stated:

> "Presumably this reason of the District Court in denying bail was one of the considerations included in the 'reasons for the action taken by the District Court which the Court of Appeals respected in not overruling the exercise of sound judgment' by the District Court."

In the case at Bar, no such report or fact of any kind has been adduced or even asserted by the Government before either of the courts below.

Thus, the District Court Judge acted without foundation.

> "'There must, however, be a reasonable foundation in the sense that circumstances are found to exist, however that finding is supported, which would warrant the court, in the exercise of a sound discretion in believing that flight was likely."
>
> *Carbo* v. *United States*, 233 F. 2d 232, 237 (C.A. 9th Cir. (1961)).

Of course,

> "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them. Fed. Rules Crim. Proc. 46(f).
>
> "In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence."
>
> *Stack* v. *Boyle*, 72 S. Ct. 1, 5.

The denial of bail in a capital case requires a finding based upon substantial evidence that if released on bail, the defendant will flee the jurisdiction and that such flight cannot be avoided regardless of the amount of bail fixed.

The statement by the District Court that travel is difficult to police and the statement by the United States Attorney that the risk in this case is greater because of the proximity of Cuba, both denude the character of bail of its fundamental importance. It seems well settled that the

ability to leave the jurisdiction is not necessarily consistent with the intent to do so.

U. S. v. *Rubenstein*, 155 F. 2d 1002;
Peo. ex rel. Lobell v. *McDonnell*, 296 N. Y. 109.

It should be added that at this time, travel to Cuba from the United States is probably more difficult than to any place else in the world. Of particular interest in this connection is the recent case of *United States* v. *Santiesteban Casanova* in the United States Court for the Southern District of New York which involved an indictment against a Cuban defendant, who was charged with conspiracy to commit sabotage. Bail was originally fixed by a Commissioner in the sum of $250,000.00 and later reduced by the District Court to $50,000.00. It is not unreasonable to suggest that Cuba was as easy to get to for a Cuban diplomat as for a Soviet diplomat.

c. "These defendants have no roots here at all." This finding was based upon the fact that the defendants are aliens and that their only child is in school in the Soviet Union.

While roots can be relevant as one of several interrelated factors, the District Court's treatment of the subject was narrow and isolated. Actually it has no meaning different from the matter of the risk of flight which we have already commented upon. And standing by itself, the fact that a defendant is an alien who eventually will return to his home, after his diplomatic assignment is completed is not evidence that he intends to flee the jurisdiction pending disposition of his case.

There are, however, facts which were before the District Court and the Circuit Court, of great significance and relevant to the matter of insuring the presence of the defendants pursuant to court order.

The defendant Ivan Dmitrievich Egorov is a Soviet diplomat who entered the United States on a diplomatic passport. It is the contention of the Soviet Government that the defendants are entitled to diplomatic immunity. That claim has been made in a note to the United States which has denied the claim. It will be raised in due course in an appropriate proceeding as well as the fact that exclusive jurisdiction of this case is in the United States Supreme Court under Article III, Section 2, Clause 2 of the Constitution. At this time the point is being made that as far as the Soviet Government is concerned the defendant Ivan Dmitrievich Egorov has diplomatic rank. He also occupies an important post at the United Nations by recommendation of the Soviet Government.

At all times since their arrest the Soviet Government has publicly associated itself with the defendants. It demanded their release on grounds of diplomatic immunity in a representation made to the State Department. It assisted the defendants in securing counsel. It received permission from the United States to send representatives to visit the defendants in prison. It made representations to the United Nations on their behalf. The Chief of the Consular Division of the Soviet Embassy and the Counselor of the Soviet Mission to the United Nations have attended all judicial proceedings which have thus far taken place.

We emphasize that the position of the Soviet Government is based upon the fact that the defendants are a Soviet diplomat occupying an important post at the United Nations, and his wife.

In this context, flight by the defendants would necessarily have an adverse impact upon relations between the Soviet Government and ours at a time when both Governments are seeking to improve their relations. We respectfully suggest that these facts far outweigh the surmise indulged in by the Courts below and by the United States Attorney.

They also make particularly relevant the precedent of *United States* v. *Melekh*. Melekh was charged with conspiracy to violate Section 793, Title 18 United States Code, a charge similar in character to the case at bar. Defendant Melekh was a Soviet national admitted under a diplomatic passport and employed under a contract to the United Nations. Bail in the sum of $50,000.00 was fixed in the Southern District of New York in the proceedings held in that Court to remove Melekh to Chicago, Illinois, where he had been indicted. The defendant posted bail in the sum of $50,000.00, returned to Chicago, Illinois, where the District Court continued the defendant's bail in the sum of $50,000.00. Melekh's departure from the United States was with the consent of our Government.

The *Soblen* and *Eisler* precedents cited by the United States Attorney are inapposite. Neither were foreign diplomats. Soblen, in fact, was an American citizen with all his roots here who fled to Israel after conviction. Eisler was a German national who fled after conviction.

POINT III

Bail is not punishment.

In *Stack* v. *Boyle*, 72 S. Ct. 1, 6, Mr. Justice Jackson, in his concurring opinion, said:

> * * * the defect in the proceedings below appears to be that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction."

The concurring opinion on this issue was not at variance with the opinion of the Court.

The finding in *Stack* v. *Boyle* would seem to have unique application to the proceedings below in this case. In the District Court emphasis was placed upon the fact that the defendants were pawns and therefore there was danger that, in obedience to a superior, they might flee the jurisdiction. As if in response to this view, the Supreme Court in *Stack* v. *Boyle*, 4, *supra*, speaking through the Chief Justice, said as follows:

> "The government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction."

In *Stack* v. *Boyle*, the Court was not dealing with a capital crime, but the standards for admission to bail are not changed by the nature of the offense, at least in the sense that evidence justifying the denial of bail is the minimum required.

That the proceedings below were defective in that the bail power was used to punish not only the defendants but their government as well, was made clear in the Circuit Court when, in the course of the oral argument, the Chief Judge of the Second Circuit asked counsel for the defendants.

> "Would an American national similarly accused in Russia be admitted to bail in Soviet Russia?"
>
> (*The New York Times*, July 17, 1963, page 3.)

The question was followed within minutes by a denial of bail from the bench. The Per Curiam opinion was issued after the close of argument.

It is well settled that bail is not to be imposed as punishment. Its only purpose is to assure the presence of the defendants. The traditional standards are to be applied in each case with each defendant.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. KLEINMAN
Attorney for Petitioners

APPENDIX A

Minutes of Hearing

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63—M—809
63—M—810

UNITED STATES OF AMERICA,

—against—

IVAN DMITRIEVICH EGOROV and
ALEKSANDRA IVANOVA EGOROV,

Defendants.

Federal Building
Brooklyn, New York
July 5, 1963

Before:

HONORABLE LEO F. RAYFIEL, U. S. D. J.

Appearances:

JOSEPH P. HOEY, Esq.
United States Attorney for the
Eastern District of New York
By: JOSEPH COSTA, Esq.
Assistant United States Attorney
Chief of Criminal Division

WILLIAM W. KLEINMAN, Esq.
Attorney for Defendants

(2) The Clerk of the Court: The United States of America against Ivan Dmitrievich Egorov and Aleksandra Ivanova Egorov.

Mr. Kleinman: Good morning, your Honor.

Mr. Costa: Good morning, your Honor.

The Court: Good morning.

Mr. Costa: The Government is present, your Honor.

Mr. Kleinman: For the defendants, your Honor.

May it please your Honor, I have here the original motion papers, and I have just served the United States Attorney with copies, on a bail application for the fixation of bail for these two defendants, husband and wife, Ivan Dmitrievich Egorov and his wife, Aleksandra Egorova.

Your Honor, the defendant Ivan Dmitrievich Egorov is forty-two years of age and is a citizen of the Soviet Government.

Ivan Dmitrievich Egorov lives here with his wife, Aleksandra, the co-defendant. They both came to this country in 1960 under contract with the United Nations, and his position was (3) in the Personnel Department of the Secretariat of the United Nations.

I believe they both arrived in October, 1960, and the term of contract was for about four years, so that in 1964 this contract would have been over.

Recently he has been promoted within his division as Head or Chief of the Personnel Department of the Secretariat of the United Nations.

Both were arrested the evening of July 2, 1963, just a few days ago. They were arrested in their apartment in Flushing, within the jurisdiction of this court.

They were brought before the Commissioner, and as I understand it, I was not present before the Commissioner, and because of the intervention of the holiday of July 4th, I was unable to look at any records, but as I understand it, your Honor, either no bail was fixed, and I don't know whether there was any discussion of any bail, I can't be sure, I think perhaps a discussion was held that Mr. Egorov wanted a lawyer, and perhaps (4) everything was put over until July 16th, and as I say, perhaps I don't know, but in any event as the matter now stands no bail was fixed in the case of either defendant and the proceedings before the Commissioner were adjourned to July 16th.

Your Honor, this motion is brought before you. I wish to express my thanks to the United States Attorney for accepting on such short notice these papers for the purpose of the fixation of bail because we have had no opportunity to ask for this before this moment.

Now, the Egorovs, Mr. and Mrs. Egorov—

The Court: By the way, is she a Soviet citizen also?

Mr. Kleinman: Sir, I am sorry—

The Court: I say, is she a Soviet citizen also?

Mr. Kleinman: Yes, they are both Soviet citizens.

Both Mr. and Mrs. Egorov returned to Russia in June of 1962. Mr. Egorov had received a three-month leave of absence from the Secretariat of the United Nations, and the purpose of (5) their returning to Russia at that time was for Mrs. Egorov to be operated on, and in fact in the month of August of 1962 I believe she underwent two major operations. As a result of those, she was not able to return at the termination of the three-month leave of absence which Mr. Egorov had received from his Depart-

ment, so he returned in September of 1962 and she returned in November of 1962.

At that time they moved into this apartment in Flushing, Queens, where the arrest had taken place. They were living there ever since.

Now, as I have stated, your Honor, they are both nationals of Soviet Russia. He is employed by the United Nations. I am not, however, now attempting to make any clear distinction of the status here. That perhaps will come at another time.

At the time of the arrest I believe the Government was aware of the fact that Mrs. Egorov was preparing to return to Russia sometime at the end of this month. I don't know whether they had agreed or whether they knew about it, but the purpose of her returning (6) was for further hospitalization and treatment in Russia.

Since the time she had returned in 1962, and even before that time, and especially since that time after she had been operated on in Russia, she had received medical treatment by the Russian doctors, as I understand it, who are assigned and are attached to the Russian Delegation here in New York.

Mr. Egorov, besides being a Soviet national, is a lawyer, having graduated and received his degree from a university in Russia.

He was born on July 30, 1921. His wife was born on or about February 23, 1924. That makes him approximately forty-two years of age, and his wife about thirty-nine years of age.

To be completely frank with your Honor and to tell you everything that I know about the Egorovs—and my only

opportunity to talk to Mr. Egorov was yesterday in the Federal House of Detention—the further family history is as follows:

There is one child who resides in Moscow. The child is about twelve years of age.

(7) There is here, if your Honor pleases, a representative of the Soviet Government, Mr. — I had his card a moment ago—yes, Mr. Nicolai G. Reznichenko, who is the First Secretary, Chief of the Consular Division, Embassy of the Union of Soviet Socialist Republics.

Your Honor, we are prepared to put up any reasonable amount of bail that your Honor might indicate or designate in this case.

Now, in order to eliminate any discussion or possibility of any immunity attaching to bail which might be offered by the Soviet delegation or the Soviet Embassy, and I anticipate something like that because about two or three years ago we had the same problem over in the Southern District of New York, we are prepared to see that bail comes from a source which I am sure would be agreeable to the Court and to the United States Attorney.

I am fully aware of the fact, your Honor, that the fixation of bail in a case of this kind, since the charge is espionage in some form and where the maximum punishment may be death, (8) that the fixation of bail is entirely in your Honor's sound discretion.

I believe I have stated all that I know about the case up to this time.

If your Honor has any questions, perhaps—

The Court: The only question I had intended to ask you you have already anticipated in answering, and that is

whether the complaint filed before the Commissioner charged an offense which was a capital offense.

Mr. Kleinman: I believe so.

I have not seen the complaint, but I think that is correct.

Mr. Costa: Yes, your Honor is correct.

The Court: Suppose we hear from Mr. Costa.

Mr. Costa: If your Honor pleases, first of all, in answer to your Honor's question as to the complaint filed before the Commissioner and upon which a warrant was issued from this court, the complaint charges a violation of Title 18, Section 794, Subdivision (c) thereof.

Your Honor, a conspiracy to violate Sub-Section (a), which is the substantive charge of espionage itself, as your Honor is no doubt (9) aware of the fact, the conspiracy to violate the substantive charge carries the same penalty, and the death penalty can be meted out under that section.

I can assure your Honor, having been present at the arraignment of both of these defendants, that the proceedings were regular and legal, and the greatest courtesies were extended to both of these defendants, to the point that where he requested that he act as interpreter for his wife, who, although she understands some English and speaks a little of it, preferred to have it interpreted into Russian.

We had a Russian interpreter present. The husband requested that he be permitted to interpret, and that request was granted.

Commissioner Schiffman advised him of all of his rights, all of his Constitutional rights, whatever rights he had, and his request was that he be permitted to get his own attorney but that he was going to contact the Soviet Embassy and that he would arrange for his own attorney.

He was told that he could do so, and a (10) phone was made available to him.

He was taken to West Street.

I might say to your Honor, without making any side remarks, that these defendants both have been treated as American citizens would be treated in our jails.

Ambassador Stevenson has made arrangements for an accredited representative of the Ministry to go to the jail to see him. They have been there. His assistant, Ambassador Plimpton, made arrangements as late as this morning to the effect that they would like to have the wife, the woman, removed to other than the jail she is in, and I have so made arrangements and so advised Ambassador Plimpton, that she is to be transferred to Nassau—

The Court: Without the Court asking the Government to disclose its evidence, I think something about the nature and character and circumstances of the crime charged would be in place.

Mr. Costa: I shall, if the Court pleases, come to that except that I wanted to, since Mr. Kleinman said he was not there, assure him (11) that these were the facts as to the proceedings before the Commissioner.

Now, there is filed in this court, if the Court pleases, a complaint which charges these two defendants, together with other people who are not named as defendants, and as the complaint says, they are known Soviet agents, Intelligence agents, as well as two people who have been apprehended under warrant issued in this court, in Washington, D. C., with committing the acts of espionage set forth, and particularly in so far as these two defendants are con-

cerned, that as late as, I believe it was June 6th of this year, and again on June 15th of this year.

In the first instance, on June 6th this known Russian agent was seen to go to a place, I believe on this occasion it was in Woodside—no, that was in Astoria—

The Court: When you refer to this known Russian agent, are you referring to somebody other than these defendants?

Mr. Costa: Other than the defendants.

As I say, this known Russian agent was seen to go to a place known as a "drop" in (12) Astoria, Long Island, and to place in a magnetic container information relating to rocket launching sites, which information he had obtained at the request of his Soviet superiors.

Shortly thereafter, the defendant Egorov and his wife were seen to approach the "drop" spot to take that magnetic container. Mr. Egorov took the container, handed it over to his wife, who in turn put it in her pocketbook, and away they went with it.

On June 15th the reverse happened. On that day, Mr. Egorov and his wife were seen to approach another location of the "drop," this time in Woodside, Long Island. He there secreted a magnetic container. He left the place. Shortly thereafter the two defendants who were apprehended in Washington, D. C., were seen to approach this magnetic container and take it away with them to Washington, D. C.

Shortly after that, the Egorovs were seen to come back to make sure that the container had been taken.

These are acts which happened right in our jurisdiction.

Your Honor, suffice it to say (13) there were other acts, but these are the acts that happened in our jurisdiction.

As to the contents, we have no doubt as to what the contents of the container were at the time.

Mr. Kleinman gives the background of these defendants. Of course, I would respectfully submit to your Honor that that very background would indicate that something should be done by our court to assure the fact that these defendants will be here at the time of trial.

The indication is that this woman has been operated on and was about to return in the latter part of this month. Whether we knew it or not I think makes no difference at this time. The indications are that if she is out on bail she will need treatment, and perhaps since she chose to go to Russia to do it, she may again choose to do that.

Now, I think, if your Honor pleases, there being no jury here presently, we certainly can discuss whether these defendants would return at the time that this case were called to trial, assuming that the facts presented before the (14) Grand Jury would indicate that an indictment would be returned, and as far as I can say, as an officer of the court, I am of the opinion that an indictment would be returned in this case if the facts were presented in due course, and they shall be, your Honor.

Your Honor, in an opinion in this Circuit, our Circuit Court, in an opinion rendered by Judge Friendly—I haven't got it handy—but he did say that facts which were to be considered were the availability of friendly countries close to the shores of the defendants' national country and their ability to get to that country without too much trouble.

I think I can say this to your Honor, I think that your Honor can almost take judicial notice of this fact, that Cuba

is only about ninety miles from our shores and that we have no extradition and there would be no ability of getting these defendants back from Cuba.

Aside from that is the very fact that they could be put in the Soviet Embassy or in one of the Embassies of friendly nations.

The Court: You mean for the purpose of (15) getting immunity?

Mr. Costa: Yes, for the purpose of getting immunity, and staying there and they could not be gotten out. That is a fact to be considered, your Honor.

But more important to be considered, and I don't want to wax too hypothetical in this matter, more important to be considered is that this is a continuing conspiracy, that if you catch one then another may come on.

Furthermore, I think, your Honor can take judicial notice of the Soblen matter and take judicial notice of Gerhardt Eisler who sits in East Germany and laughs up his sleeve at the United States—whether he was guilty or not guilty.

I think, your Honor, these facts should be taken into consideration, the availability of these defendants to airplanes, ships, trawlers, submarines, whatever it may be, to escape our jurisdiction is, as I say, all a matter which your Honor, I think, must take into consideration.

Now, the Government has a valid complaint (16) on file. As Mr. Kleinman said and as your Honor will agree, this is a matter which is—notwithstanding the fact that these are not times of a hot war—this is a matter which is punishable by death, and that is a matter which your Honor should and must take into consideration at this time.

I say to your Honor there is one more fact as to the roots of these people here. I can say to your Honor that we know that this boy came here with his parents in 1960, went to a school here for a year, and then was returned to Russia and presently is in Russia, this twelve-year-old boy.

There are no other roots to keep these people here.

Now I say to your Honor as the Government stated before the Commissioner that this is a matter or a case in which no bail should be set; that they should be remanded, and I insist upon that as far as the Government is concerned on this proceeding.

Mr. Kleinman: May I be heard again, please?

The Court: Yes, surely.

(17) Mr. Kleinman: Your Honor, I don't want to make any speeches so close to the 4th of July about the implications of speeches like that of the United States Attorney.

I believe very strongly about the safety and security of my country.

I should like to point out to your Honor that in the cases mentioned by the United States Attorney, bail was fixed in every one of those cases. True, one of them had fled the country.

In the Copeland case there was fixed. There was one case quite similar to this which I happen to know something of, and that also dealt with the Soviet delegation, the Soviet Embassy, and with an employee of the United Nations, and that happened just about two and a half years ago in the Southern District of New York, and that was the case of Melekh.

I believe Melekh was an employee of the Secretariat of the United Nations. I appeared for him, so I know some of the facts. Bail had been fixed in the Southern District of New York, in his case, on a charge which was, I believe, the same as this, espionage, in the (18) amount of $50,000, the indictment having already been returned in Chicago. And so we were actually before the Southern District Court on removal proceedings, but we were also there in order to get the Government to accept the $50,000 which we were prepared to put up for Mr. Melekh's bail.

I won't go any further into the history of this, but may I say, your Honor, that $50,000 was put up in the District Court of the Southern District.

Melekh himself returned to Chicago. He appeared in the Chicago courts. Then there came a time where, because of the intervention of another department of the Government, the Executive Branch of the Government, the State Department, something happened and the case never came to trail. In fact, it was dismissed and Mr. Melekh was free and perhaps told to return to Russia.

Your Honor, the important thing at this time, of course, is not to prejudge the defendants in this case.

It is possible for these defendants to (19) run to an asylum or to flee the jurisdiction?

It is possible in every case, your Honor.

There is no greater insecurity at this moment than there was at the time of Melekh, with the exception now that we have the Cuban situation which Mr. Costa told your Honor about. But this doesn't make the situation any different.

If Melekh did not seek security or asylum or immunity—your Honor suggested the word "immunity"—and he was present at every step of the proceedings, I am sure that your Honor will find that this is a comparable situation, that these defendants will act in the same way.

I tried to be as frank as I could to the Court when I explained Mrs. Egorov's illness; then, of course, the United States Attorney used that as a weapon against me, that because she is ill she will surely go to Russia to be operated on because she had been operated on. She doesn't need an operation there now, she needs further medical attention. They say she might go to Russia because she wants further (20) medical attention.

I am sure that if it is pointed out to her that we have good doctors, in this country, in Brooklyn or in Queens, that she would go to the good doctors, or her Russian doctors here could take care of her, too.

I believe, especially at such a time, and I am attempting to avoid displaying any particular knowledge because I have none, nor to offer any opinion in the nature of advice, nor have I been called upon to give any, but the climate of the situation today, I think, between our great countries is a little bit better than it was at the time of the Melekh situation.

The Court: Mr. Kleinman, in making my determination, I certainly shall not be influenced by the fears expressed by Mr. Costa that these defendants, or at least one of them, may avail himself or herself of the security of the Embassy for the purpose of avoiding arrest and punishment.

But I am giving very serious consideration not only to the serious nature of the crime, (21) with which, of

course, you are familiar, but of what appears to be very substantial evidence in the possession of the Government as to the commission of the offenses charged in the complaint.

Then, as Mr. Costa stated, these defendants have no roots here at all. The means of transportation to command from the United States are so many and so relatively easily obtainable that the likelihood of their appearing to ans . . the charges against them is very substantially reduced—

Mr. Kleinman: Your Honor—

The Court: (Continuing) I think that is—

Mr. Kleinman: In the Melekh case—

The Court: (Continuing) That is a very important factor.

Mr. Kleinman: In the Melekh case these factors were precisely considered by the Court, precisely these factors.

The Court: Are you speaking now of those cases where the facts were considered, bail was fixed, and then the defendants left the country?

Shouldn't that be a concern here?

(22) Mr. Kleinman: In the Eisler case, he fled, but I don't know those facts.

I am telling you that only about two years ago, in the Melekh case, these facts were considered. These same arguments were advanced by the United States Attorney and certain conditions were laid down. I believe they were that he was not to appear within a certain distance of an airport or a steamship line, trains of some sort, and to keep away from the Soviet Embassy.

The Court: The difficulty of policing—

Mr. Kleinman: He did not flee.

The Court: The difficulty of policing such restrictions is infinite.

Mr. Kleinman: The easiest thing with anybody, of course, is to keep them in jail.

The Court: No, no, because the rules prescribe in certain cases, other than those in a capital case, that bail must be fixed, the amount being such as reasonably calculated to assure their appearance.

Mr. Costa: Your Honor, may I say that your Honor has so wisely pointed out to Mr. (23) Kleinman the fact that he has pointed to the Melekh case where the defendant did appear but refuses to recognize those cases in which the defendants did not appear.

We don't know whether he is important, as Melekh was not. We know that he was here, that he did return to Russia and we know where he is now and what he is doing.

I can also say to your Honor that this defendant—I don't know what contract Mr. Kleinman is talking about—that he was under contract to the Soviet Government before coming here—

Mr. Kleinman: I said Secretariat.

Mr. Costa: To the Secretariat, but before coming here he was an employee of the Ministry of Foreign Affairs in Russia, and he had been in some diplomatic or some public or official position right before coming to this country.

So how important this defendant may be as against the importance of Melekh to the Soviet Union, I am not ready to evaluate at this time. But I am ready to say that he must be an important person if he is in the position (24) that he is in.

I think, further, the Government must recognize what it cost us in the Soblen matter because the bail money forfeited could not repair the irrepairable damage that was done.

The Court: I know nothing in the rules—

Mr. Kleinman: Your Honor—

The Court: I know nothing in the rules nor in the applicable cases which require the Court to consider how important a figure a defendant is in the political system.

Mr. Costa: Only on the question of the possibility of his being here—

Mr. Kleinman: Your Honor, may I state this—

Mr. Costa: (Continuing) —on that question.

Mr. Kleinman: Your Honor, these comparisons or analogies which Mr. Costa gave, well, Soblin was an American citizen. I don't recall about Eisler. Melekh came to this country under a diplomatic passport. Mr. Egorov and his wife came here under his diplomatic passport.

You see, the one who is a Soviet national did not run away; it was the American who ran (25) away. Eisler, I think, also was an American and ran away.

The Court: I think, Mr. Kleinman, each of these cases is sui generis.

I can't make a determination based on what Eisler did or Soblin did—

Mr. Kleinman: True.

The Court: (Continuing) —with all due deference.

Mr. Kleinman: But what I am trying to do is to answer what he has said to your Honor.

The Court: This crime is a serious one. It is a capital offense. Mr. Costa mentioned certain items of evidence

which the Government has which appear to be very important and substantial, and the defendant's tenure in his office is to expire in the not too distant future.

Mr. Kleinman: October, 1964.

The Court: Even if that were not the fact, the means of leaving this country, and I am speaking of transportation, are so readily available that I think the risk of failure to answer the charges is very great.

(26) While I believe and I am happy that the international climate is better than it was, and I think a further improvement is a matter which consummation is devoutly to be wished for, we don't decide applications of this kind on that basis.

Mr. Kleinman: May I point out to your Honor that in all of these cases mentioned before, bail had been fixed. True, Soblen, the American citizen under bail, fled from this country. Eisler, who was a German citizen, fled from this country. But the other cases where the Russian nationals, the Russian citizens were involved, who came into this country under a diplomatic passport, they did not flee from this country. The charge was espionage.

Mr. Costa: From the viewpoint of the Government, whether they were American citizens or German citizens, it was espionage.

Mr. Kleinman: You don't know that, you don't know—

Mr. Costa: That was the charge.

Mr. Kleinman: But you don't know that.

The Court: Mr. Costa stated, Mr. Kleinman, (27) or I think it was you, that this matter was adjourned for a hearing if one is desired before—

Mr. Kleinman: You know we won't get a hearing, your Honor.

The Court: Well, if you won't, it will be largely because of the fact that the United States Attorney can be depended upon to specially make a presentation to the Grand Jury.

I assume that this requires the collection and collation of a lot of information and evidence.

However, if the Government should fail to proceed with expedition, you have Rule 48 available to make them do so.

Mr. Kleinman: Your Honor, they were arrested on July 2nd. This has already been put over to July 16th.

I can make a prophecy, I think with some great degree of success, that we will never get a hearing in the Commissioner's office.

Mr. Costa: Look at me and say that.

Mr. Kleinman: We will never get a hearing in the Commissioner's office.

I say that because Mr. Costa will bestir himself, I am quite sure of that, I know how (28) diligent and energetic he is, and he will present this matter before the Grand Jury before this matter—

The Court: That is what I expect him to do.

Mr. Kleinman: (Continuing)—before this matter will proceed to the 16th.

So we will have had between the 2nd of July until the 14th, or whatever day it may be before the 16th, that these people are going to be incarcerated.

Then we will be presented with an indictment.

Does your Honor suggest that some other Judge might overrule your decision, might overrule whatever that might be?

The Court: I am not suggesting that he would have the right to do that.

Mr. Kleinman: You know very well he would not. Once you pass upon these bail applications, none of your colleagues will do anything to the contrary.

The Court: As a matter of fact, he may have additional information which would make my determination not binding upon him.

Mr. Kleinman: Mr. Costa will tell the (29) same story as to what happened in Flushing, what happened in Queens and his "drop" places, so he will have the same information.

The Court: I prefer not to anticipate what Mr. Costa will do. It may be I who will be called upon to pass upon it. I don't know what the calendar for the next few weeks is. This is our vacation season.

Mr. Kleinman: Yes.

Mr. Costa: Yesterday was the 4th of July, too.

Mr. Kleinman: I was working on the 4th of July and I disturbed him on the 4th of July, disturbed Mr. Costa in order to be printed to see my client. I had not filed my notice of appearance, and Mr. Costa was good enough to extend to me the courtesy of identifying me, with my assurance that I would file one today.

I might say that there has been no lack of courtesy shown. I am not speaking of the things that may have happened at the time of the arrest because I am not aware of that situation at all.

My only desire was to see the man and to (30) have determine whether he wanted to retain me and to get these

biographical details which I told your Honor for this bail application.

I wanted to thank Mr. Costa for that.

Mr. Costa: It is always my pleasure.

The Court: Mr. Kleinman, I believe on the basis of the information I now have, I ought to deny your application on behalf of both of these defendants.

Mr. Kleinman: Before your Honor's determination, may I say on behalf of the wife—that is, if you should make that determination in the case of the husband, Ivan Egorov, in view of the wife's illness, and I know that they receive medical attention in jails, but surely not as good as you can get on the outside, would your Honor not consider her for that special reason a little bit separate from the husband's situation?

The Court: I assume, although I did not hear Mr. Costa specifically say so, that she is charged by the Government with having played an active part in the acts which constitute the crime charged. If that be a fact, I can (31) make no distinction between them.

Mr. Kleinman: It is entirely within your discretion.

The Court: I realize that, I realize that.

Mr. Kleinman: In every one of these cases—

The Court: I don't believe I ought to exercise it in her favor.

Mr. Kleinman: In every one of these cases where the charge is made, there is always some sort of a very active participation on the part of a defendant, like in the Melekh case, where bail was fixed. They don't indict without something. The Government is always able to tell the Court

that the men played a part in the alleged crime, but I was hopeful that your Honor might consider the fact that Mrs. Egorov should not be in jail if she requires some medical attention. And her husband being here would seem to be further assurance of her remaining.

The Court: As you have very well said, we have very, very competent medical experts who can give her any care or treatment and attention that her condition may require.

(32) Mr. Kleinman: I said here (indicating with hands), I didn't say in jail, your Honor.

The Court: Even there it can be made available.

Mr. Kleinman: I don't want to pass upon the competency of the doctors in jail.

The Court: I am going to deny the application in both cases.

Mr. Kleinman: Your Honor, you will no doubt permit me an exception.

(The hearing was then concluded.)

I hereby certify that the foregoing is a true and accurate transcript from the stenographic notes in this proceeding.

EMANUEL KERR
Official Court Reporter
U. S. District Court

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 414-415—October Term, 1962

(Argued July 16, 1963 Decided July 16, 1963)

Docket Nos. 28334-28335

UNITED STATES OF AMERICA,

Appellee,

v.

IVAN DMITRIEVICH EGOROV, a/k/a IVAN D. YEGOROV and ALEKSANDRA IVANOVNA EGOROVA, a/k/a ALEXANDRA I. EGOROVA; JOHN DOE, a/k/a ROBERT KEISTUTIS BALTCH, a/k/a ROBERT BALTCH; and JANE DOE, a/k/a JOY ANN GARBER, a/k/a JOY ANN BALTCH, a/k/a JOY A. BALTCH,

Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and HAYS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, Leo F. Rayfiel, J., denying bail before trial and application to Court of Appeals for bail.

Bail denied.

Appendix B
Opinion of United States Court of Appeals

WILLIAM W. KLEINMAN, New York, N. Y., *on the briefs for appellants.*

JOSEPH V. COSTA, Assistant United States Attorney (Joseph P. Hoey, United States Attorney, Eastern District of New York, Brooklyn, New York, on the brief) *for appellee.*

PER CURIAM:

We affirm in open court the order of the district court denying bail to Ivan Dmitrievich Egorov and Aleksandra Ivanovna Egorova pending trial, and we deny their application for bail.

Egorov and Egorova, who are husband and wife, were arrested on July 2, 1963 on a charge of conspiracy to commit espionage in violation of 18 U. S. C. § 794(a), an offense which may be punishable by death. Thereafter on July 15, 1963, an indictment was returned in the Eastern District of New York charging against appellants and three others with conspiracy to communicate, deliver and transmit to a foreign government, the Soviet Union, information relating to the national defense of the United States "and particularly information relating to military installations, rocket launching sites, naval installations, troop movements, ship movements, shipments of military supplies and atomic weapons, shipyards and military waterfront facilities, with intent and reason to believe that the said information would be used to the advantage of the said foreign government, to wit, the Union of Soviet Socialist

Republics" and to engage in other espionage activities, all in violation of 18 U. S. C. § 794(a).

As the crime charged is punishable by death there is no right to bail before conviction. In such cases Rule 46(a) of the Federal Rules of Criminal Procedure specifically states that admission to bail is a matter of discretion.

We agree with the district court that the nature of charges, the fact that the defendants are citizens of a foreign country, and all the circumstances of this case justify the position of the United States Attorney in urging that bail be denied.

Whether we treat this as an appeal from the order of the district court; *Stack* v. *Boyle*, 342 U. S. 1 (1951); *United States* v. *Noto*, 226 F. 2d 953 (2 Cir. 1955), or as an application to this court for bail the result is the same.

We are in agreement that bail should be denied.

APPENDIX C

Judgment (U.S.A. v. Ivan D. Egorov)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July, one thousand nine hundred and sixty-three.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

IVAN DMITRIEVICH EGOROV,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix C

Judgment (U.S.A. v. Ivan D. Egorov)

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX D

Judgment (U.S.A. v. Aleksandra Egorova)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July, one thousand nine hundred and sixty-three.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v. —

ALEKSANDRA EGOROVA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix D
Judgment (U.S.A. v. Aleksandra Egorova)

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX E

Endorsement of Mr. Justice Harlan on Application For Bail

On the application for bail. Denied. See endorsement at the foot of this application. J.M.H. 8/11/63.

Bail before trial on a charge of this kind—conspiracy to commit espionage involving the security of the United States—is a discretionary matter. F. R. Crim. Proc., Rule 46 (a)(1).

Having considered the petitioners' papers, those submitted by the Solicitor General in opposition, I conclude that I should not disturb, even though my power to do so is not questioned, the denial of bail by the four judges below.

Apart from this, I seriously doubt the propriety of an individual justice exercising his power to grant bail where, as here, the Court of Appeals upon plenary appellate review has affirmed a District Court's denial of bail, and no petition for certiorari to review that determination has been filed in his Court. *Stack* v. *Boyle*, 342 U.S. 1.

On both grounds these applications for bail are denied. In so deciding I assume that petitioners will be afforded a prompt trial of the charges against them.

J.M.H. 8/11/63

APPENDIX F

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTPICT OF NEW YORK

Cr. No.

UNITED STATES OF AMERICA

v.

IVAN DMITRIEVICH EGOROV, a/k/a IVAN D. YEGOROV; ALEKSANDRA IVANOVNA EGOROVA, a/k/a ALEXANDRA I. EGOROVA; JOHN DOE, a/k/a ROBERT KEISTUTIS BALTCH, a/k/a ROBERT BALTCH; and JANE DOE, a/k/a JOY ANN GARBER, a/k/a JOY ANN BALTCH, a/k/a JOY A. BALTCH.

Violation of: 18 U.S.C. 794(c); 18 U.S.C. 371

THE GRAND JURY CHARGES:

COUNT I

1. That from in or about March, 1957 and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of New York; in Moscow, Union of Soviet Socialist Republics; in the District of Columbia; in the District of Maryland; and elsewhere, IVAN DMITRIEVICH EGOROV, also known as IVAN D. YEGOROV; ALEKSANDRA IVANOVNA EGOROVA, also known as ALEXANDRA I. EGOROVA; JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH; and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH,

also known as Joy A. Baltch, the defendants herein, unlawfully, wilfully and knowingly did conspire and agree with Petr Egorovich Maslennikov, Aleksei Ivanovich Galkin, and various other officials of the Soviet Military Intelligence, co-conspirators but not defendants herein, and with divers other persons to the grand jury unknown, to violate Subsection (a) of Section 794, Title 18, United States Code, in that they did unlawfully, wilfully and knowingly conspire and agree to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof directly and indirectly, information relating to the national defense of the United States of America and particularly information relating to military installations, rocket launching sites, naval installations, troop movements, ship movements, shipments of military supplies and atomic weapons, shipyards and military waterfront facilities, with intent and reason to believe that the said information would be used to the advantage of the said foreign government, to wit, the Union of Soviet Socialist Republics.

2. It was a part of said conspiracy that the defendants and their co-conspirators would collect and obtain, and attempt to collect and obtain, and would aid and induce divers other persons, to the grand jury unknown, to collect and obtain information relating to the national defense of the United States of America, with intent and reason to believe that the said information would be used to the advantage of the said foreign government, to wit, the Union of Soviet Socialist Republics.

3. It was further a part of said conspiracy that the government of the Union of Soviet Socialist Republics and certain of the co-conspirators, including Aleksei Ivanovich Galkin and Petr Egorovich Maslennikov, being representatives, agents, and employees of the government of the Union of Soviet Socialist Republics, would by personal contact, communications, and other means to the grand jury unknown, both directly and indirectly employ, supervise, pay and maintain the defendants and other co-conspirators for the purpose of communicating, delivering and transmitting information relating to the national defense of the United States of America to the said government of the Union of Soviet Socialist Republics.

4. It was further a part of said conspiracy that certain of the co-conspirators, including Aleksei Ivanovich Galkin and Petr Egorovich Maslennikov would cultivate and attempt to activate as agents within the United States, certain members of the United States Armed Forces, certain employees of military and naval installations and other individuals, who were in a position to acquire information relating to the national defense of the United States of America and would communicate, deliver and transmit, such information to the government of the Union of Soviet Socialist Republics.

5. It was further a part of said conspiracy that the defendants, JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH, and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A. BALTCH, and certain of their co-con-

spirators, would use short wave radios to receive instructions issued by the said government of the Union of Soviet Socialist Republics.

6. It was further a part of said conspiracy that the said defendants and their co-conspirators would communicate with each other by enclosing messages, and information in magnetic containers and depositing said magnetic containers in pre-arranged "drop" points in the vicinity of Astoria, Long Island, in the vicinity of Woodside, Long Island and at other places in the Eastern District of New York and elsewhere.

7. It was further a part of said conspiracy that the defendants and certain of their co-conspirators would receive from the government of the Union of Soviet Socialist Republics and its agents, officers and employees, large sums of money with which to carry on their illegal activities within the United States.

8. It was further a part of said conspiracy that the defendants, JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH; and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A. BALTCH, would assume the identities of certain living United States citizens and would use passports in the names of other living United States citizens.

9. It was further a part of said conspiracy that the defendants and their co-conspirators would communicate with each other and other agents, officers and employees of the government of the Union of Soviet Socialist Republics

through the use of codes, ciphers and other types of secret writings and would adopt divers other means to conceal the existence and purpose of said conspiracy.

In pursuance and furtherance of the said conspiracy and to effect the object thereof, the defendants and their co-conspirators did commit among others, in the Eastern District of New York, and elsewhere the following:

OVERT ACTS

1. On or about September 23, 1962, Petr Igorovich Maslennikov and Aleksei Ivanovich Galkin, co-conspirators herein, did travel to the vicinity of the Greystone Railroad Station in Westchester County, New York.

2. On or about October 21, 1962, Petr Igorovich Maslennikov and Aleksei Ivanovich Galkin, co-conspirators herein, did go to the vicinity of 47th Avenue and 69th Street, Queens, within the Eastern District of New York.

3. On or about November 26, 1962, Petr Igorovich Maslennikov, a co-conspirator herein, did go to the vicinity of Van Cortlandt Park Avenue and McLean Avenue in Yonkers, New York.

4. On or about January 19, 1963, Petr Igorovich Maslennikov and Aleksei Ivanovich Galkin, co-conspirators herein, did travel to the vicinity of Bronxdale Avenue and Wallace Avenue, Bronx, New York.

5. On or about June 6, 1963, Ivan Dmitrievich Egorov, also known as Ivan D. Yegorov, and Aleksandra Ivanovna

EGOROVA, also known as ALEXANDRA I. EGOROVA, defendants herein, did travel to the vicinity of Astoria, Long Island, within the Eastern District of New York.

6. On or about June 15, 1963, IVAN DMITRIEVICH EGOROV, also known as IVAN D. YEGOROV, and ALEKSANDRA IVANOVNA EGOROVA, also known as ALEXANDRA I. EGOROVA, and JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH, defendants herein, did travel to the vicinity of Woodside, Long Island, within the Eastern District of New York.

7. On or about June 16, 1963, JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH, a defendant herein, met with JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A. BALTCH, a defendant herein, in Washington, D. C.

In violation of 18 U.S.C. 794(c).

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That from in or about March, 1957 and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of New York; in Moscow, Union of Soviet Socialist Republics; in the District of Columbia; in the district of Maryland; and elsewhere, IVAN DMITRIEVICH EGOROV, also known as IVAN D. YEGOROV; ALEKSANDRA IVANOVNA EGOROVA, also known as ALEXANDRA I.

EGOROVA; JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH; and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A. BALTCH, the defendants herein; Petr Egorovich Maslennikov, Aleksei Ivanovich Galkin, and various other officials of the Soviet Military Intelligence, co-conspirators but not defendants herein, unlawfully, wilfully, and knowingly did conspire and agree to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 951.

2. It was a part of said conspiracy that the defendants, JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH, and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A. BALTCH, not being diplomatic and consular officers or attaches, unlawfully, wilfully and knowingly would act in the United States as agents of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State.

3. It was further a part of said conspiracy that the defendants, IVAN DMITRIEVICH EGOROV, also known as IVAN D. YEGOROV and ALEKSANDRA IVANOVNA EGOROVA, also known as ALEXANDRA I. EGOROVA, and the co-conspirators, Petr Egorovich Maslennikov and Aleksei Ivanovich Galkin, unlawfully, wilfully, and knowingly would aid, abet, con mand, induce and procure, the defendants JOHN DOE, also known as ROBERT KEISTUTIS BALTCH, also known as ROBERT BALTCH, and JANE DOE, also known as JOY ANN GARBER, also known as JOY ANN BALTCH, also known as JOY A.

BALTCH, not being diplomatic and consular officers or attaches, unlawfully, wilfully and knowingly to act in the United States as agents of a foreign government, to wit, the Union of Soviet Socialist Republics, without prior notification to the Secretary of State.

In furtherance of said conspiracy and to effect the object thereof, the defendants and co-conspirators did commit, among others, in the Eastern District of New York, and elsewhere, the following:

OVERT ACTS

The Grand Jury repeats and realleges Overt Acts 1 through 7, alleged in the First Count of this Indictment, as though fully set forth herein.

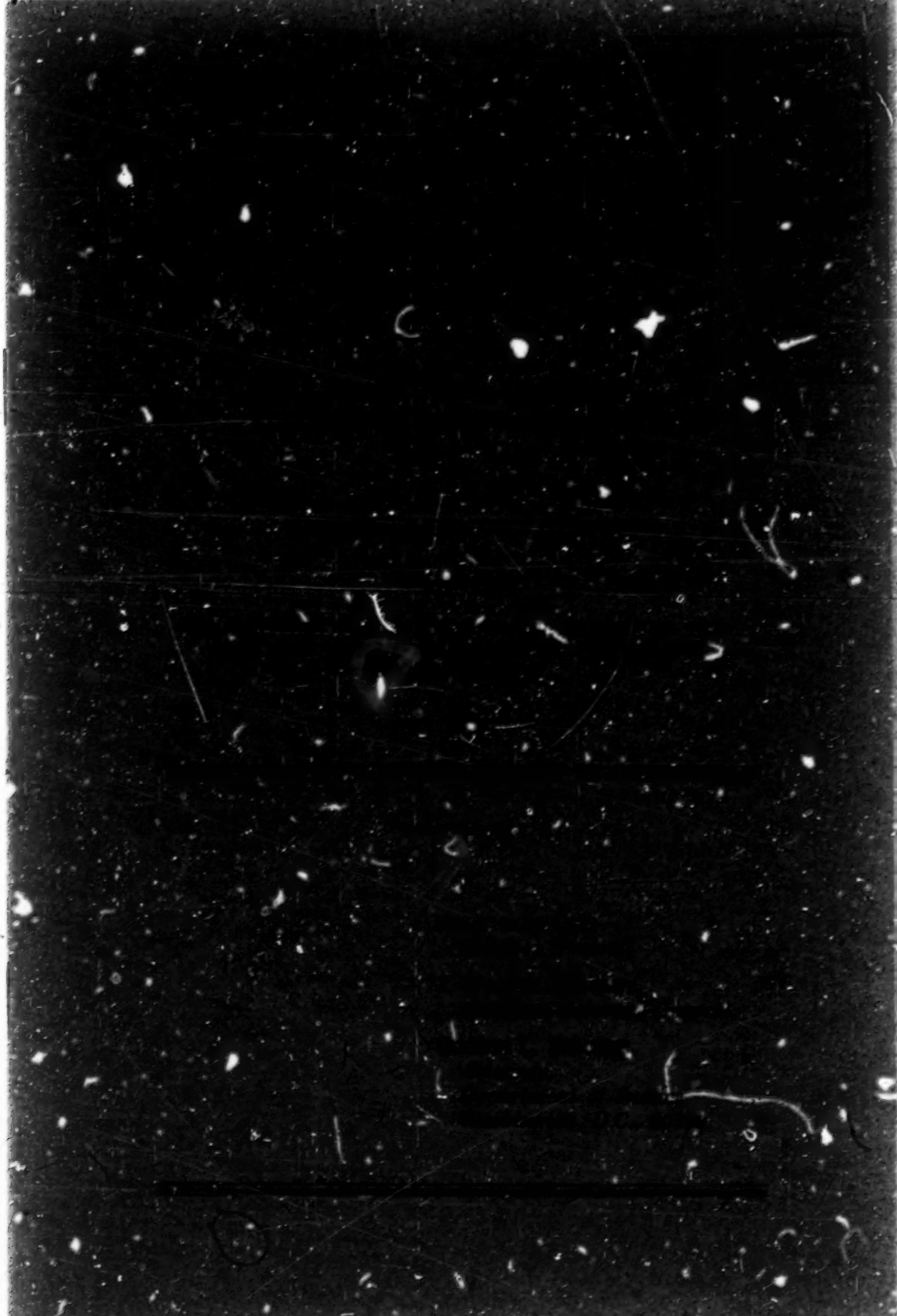
In violation of 18 U.S.C., 371.

A TRUE BILL:

LEO A. SCHER
Foreman

JOSEPH P. HOEY
United States Attorney

PAUL C. VINCENT
Special Attorney
Department of Justice



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 376

IVAN DMITRIEVICH EGOROV, AND
ALEKSANDRA EGOROVA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 38-40) has not yet been reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41-44) was entered on July 16, 1963. The petition for a writ of certiorari was filed on August 15, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, involving a capital offense, petitioners were required to be admitted to bail.

STATEMENT

On July 2, 1963, the petitioners were arrested at Flushing, Long Island, pursuant to a warrant issued by a United States Commissioner on the basis of a sworn complaint charging them with conspiracy to commit espionage in violation of 18 U.S.C. 794(a). They were arraigned the same day before the Commissioner and held without bail pending a preliminary hearing. On July 5, 1963, the district court (Judge Rayfiel), after hearing, denied bail. While an appeal from that order was pending before the Court of Appeals for the Second Circuit, these petitioners and two others were indicted on July 15, 1963, by a federal grand jury in the Eastern District of New York (Pet. App. 38-40). Count I charged a conspiracy to commit espionage, and Count II charged a conspiracy to violate 18 U.S.C. 951, which prohibits acting as an agent of a foreign government without having notified the Secretary of State. Both conspiracies are alleged to have existed since March 1957 and to have taken place in the United States and the Soviet Union. Count I charged, among other things, that the petitioners conspired to transmit to the Soviet Union information relating to

the national defense of the United States "and particularly information relating to military installations, rocket launching sites, naval installations, troop movements, ship movements, shipments of military supplies and atomic weapons, shipyards and military waterfront facilities" (Pet. App. 47).

On July 16, 1963, the court of appeals, after oral argument, affirmed the denial of bail (Pet. App. 38-44). An application for bail was denied by Mr. Justice Harlan on August 11, 1963 (Pet. App. 45), and on August 17, 1963, he denied a renewed bail application. On September 5, 1963, the Chief Justice denied the application.

The pertinent facts may be summarized as follows: Mr. Egorov and his wife are both citizens of the Soviet Union. They entered this country in October 1960 under a diplomatic passport for employment with the United Nations under a contract which expires in October 1964. They temporarily returned to Russia in June 1962 to enable Mrs. Egorova to receive medical treatment. She there underwent two major operations in August 1962. Mr. Egorov returned to the United States in September and his wife in November, 1962. Mrs. Egorova recently had arranged to return to Russia at the end of July 1963 for further medical treatment. They have a twelve-year old child, who presently resides in Moscow (Pet. App. 18-21).

The Soviet government contends that petitioners are entitled to diplomatic immunity, and it has made such a claim to the United States, which rejected it. At all times since their arrest the Soviet government

has publicly associated itself with the petitioners. It has assisted them in securing counsel and has made representations to the United Nations in their behalf; and its government officials have attended all judicial proceedings thus far (Pet. 12).

At the hearing before the district court the Assistant United States Attorney also referred to two specific acts set forth in the complaint. He stated that on June 6, 1963, a known Russian agent (other than these petitioners) was observed going to a place known as a "drop" in Astoria, Long Island, where he placed in a magnetic container information relating to rocket launching sites, which information he had obtained at the request of his Soviet superiors. Shortly thereafter, the petitioner Egorov and his wife were seen to approach the "drop" point, where Mr. Egorov took the container and handed it over to his wife, who in turn put it in her pocketbook. He stated that on June 15, 1963, Mr. Egorov and his wife were seen to hide a magnetic container at another "drop" point, this time at Woodside, Long Island, and that shortly thereafter one of the co-defendants was seen to approach this point and take the container away with him (Pet. App. 24; Complaint p. 4).

ARGUMENT

Petitioners' constitutional claim is plainly without merit. The Eighth Amendment, prohibiting "excessive bail," gives no absolute right to bail in all circumstances. *Carlson* v. *Landon*, 342 U.S. 524. Nor does the exercise of discretion by the district court in

denying bail, affirmed by the court of appeals, warrant review by this Court.

Rule 46(a)(1) of the Federal Rules of Criminal Procedure provides that a person arrested for a capital offense "may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense." Petitioners are Soviet citizens who have been indicted for the extremely serious crime of conspiring to transmit to the Soviet Union vital information relating to this country's national defense. The alleged conspiracy has been in existence for more than six years, and the petitioners directly participated in two overt acts in furtherance of the conspiracy committed during the month before the indictment was returned. The Soviet government claims diplomatic immunity for petitioners, who are only temporarily residents of this country, and it has shown considerable interest in the case.

In these circumstances, we think it is clear that petitioners manifestly are poor bail risks. Their primary loyalties and ties obviously are to Russia, where their son resides, to which they returned for several months last year and to which Mrs. Egorova was planning to return for medical treatment, and under whose diplomatic passport they originally entered this country. They would have the strongest reasons to flee the country and escape prosecution under this indictment. If they should return to the Soviet Union, it would be wholly consistent with the latter's claim that they have diplomatic immunity for

it to refuse to return them to face trial in this country. Moreover, there is no extradition treaty covering the crimes with which they are charged.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

GEORGE L. FRICKER,
Attorney.

SEPTEMBER 1963.

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